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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 NAVIGATORS SPECIALTY INSURANCE  
12 COMPANY,

13 Plaintiff,

14 vs.

15  
16 CHSI OF CALIFORNIA, INC., et al.,

17 Defendant.  
18

CASE NO. 3:12-cv-1611-GPC-JMA

**ORDER:**

**(1) GRANTING DEFENDANT  
CRMBC'S MOTION TO STAY**

**(2) DENYING DEFENDANT  
CHSI'S MOTION TO DISMISS**

**(3) DISMISSING PLAINTIFF'S  
MOTION TO STRIKE**

[DKT. NOS. 3, 9, 25]

19  
20 On August 28, 2012, Defendant California Restaurant Mutual Benefit Corp. ("CRMBC") filed  
21 a motion to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt.  
22 No. 3.) On August 29, 2012, Defendants CHSI filed a motion to dismiss Plaintiff's complaint  
23 pursuant to Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 9.) On September 25, 2012, Plaintiff  
24 filed an ex parte motion to strike Defendants' notice of joinder. (Dkt. No. 25.) On February 1, 2013,  
25 the Court held a hearing on these pending motions. For the reasons set out below, the Court hereby  
26 **GRANTS** Defendant CRMBC's motion to stay, **DENIES** CHSI's motion to dismiss, and  
27 **DISMISSES** Plaintiff's motion to strike.  
28

1 **I. BACKGROUND**

2 On or around September 16, 2004, California Restaurant Mutual Benefit Corporation  
3 (“CRMBC”) entered into a Management Services Contract with CHSI for the performance of  
4 underwriting services. CRMBC is an organization formed by a group of related California  
5 businesses to operate a group workers’ compensation self-insurance fund that pools compensation  
6 liabilities and provides a common benefit delivery system for its members. CHSI was hired by  
7 CRMBC as a business experienced in the management and operation of self-insured groups. On  
8 March 28, 2012, CRMBC filed a lawsuit in the Superior Court of California against CHSI and  
9 others, alleging breach of contract and other claims. Prior to the initiation of the lawsuit, CHSI on  
10 July 8, 2011, provided notice to their insurer Navigators Specialty Insurance Company  
11 (“Navigators”) of the potential claim by CRMBC. After initial review, Navigators agreed to treat  
12 the July 8, 2011 letter as notice of a potential claim under the policy agreement. On April 17,  
13 2012, Navigators advised that it would provide CHSI with a defense in the CRMBC action, subject  
14 to a complete reservation of rights, including the right to withdraw from the defense and/or seek  
15 reimbursement.

16 On July 28, 2012, Navigators filed this insurance coverage lawsuit, seeking declaratory  
17 judgment regarding no duty to defend or indemnify; applicable limit of liability; and other  
18 provisions that may bar or limit coverage. (Dkt. No. 1.) In particular, Navigators seeks judgment  
19 that there is neither coverage for, nor a duty to defend, the Defendant/Insured CHSI under the  
20 Policy agreement in connection with the underlying state court action California Restaurant Mutual  
21 Benefit Corporation v. CHSI of California, Inc., et al., 37-2012-00052274-CU-BC-NC. (the  
22 “CRMBC Action.”)

23 Pending before this Court are two motions to dismiss. In the first-filed motion to dismiss,  
24 CRMBC seeks an order to dismiss Navigators’ claim or in the alternative an order to stay until the  
25 underlying liability action is fully adjudicated. (Dkt. No. 3.) CRMBC first asserts that Navigators’  
26 complaint fails to state a claim or proper ground upon which a declaratory judgment can or should  
27 be granted under the Declaratory Judgment Act, 28 U.S.C. § 2201 & 2202 (“DJA”), and therefore  
28 the action is entitled to dismissal under FRCP 12(b)(6). CRMBC asks the Court to decline to

1 exercise its permissive declaratory judgment jurisdiction over Navigators' action because it  
2 "conflicts with and turns on facts and other issues that are necessarily at issue and will be resolved  
3 in the Underlying Action...[which] renders Navigators' declaratory action neither necessary nor  
4 proper at this time." (Dkt. No. 3) CRMBC further asserts that dismissal is warranted because  
5 Navigators action is the product of improper forum shopping, the action will not dispose of the  
6 entire action or legal disputes between the parties, and the underlying action touches on substantial  
7 and important issue of state public and regulatory policy. (Dkt. No. 3 at 1-3.) Defendant CHSI  
8 filed a motion to join Defendant CRMBC's motion to stay. (Dkt. No. 18.)

9 Defendant CHSI subsequently filed a motion to dismiss, echoing many of the allegations  
10 made by CRMBC. (Dkt. No. 9.) In particular, CHSI contends that Navigators must establish that  
11 no potential coverage exists for the CRMBC Action in order to obtain declaratory relief for no duty  
12 to defend. That determination relies upon the adjudication of facts and law in the underlying  
13 action. CHSI further asserts that Navigators failed to ascertain a declaration that it had no duty to  
14 defend prior to the underlying action taking place, and therefore is precluded to obtaining a  
15 determination of no duty to defend. Lastly, CHSI outlines the areas of factual overlap between this  
16 case and the underlying CRMBC Action, and asserts the underlying action is a "parallel state court  
17 action involving the same issues and parties." Accordingly, CHSI requests the Court decline to  
18 review Navigators' claim for declaratory relief.

#### 20 **The "CRMBC Action"**

21 It is undisputed that this insurance coverage dispute arises out of allegations in the  
22 underlying state court action that the Insured/Defendant CHSI failed to properly manage and  
23 operate a self-insured workers compensation group (CRMBC) by charging insufficient rates to  
24 members. According to CRMBC's state court complaint, Defendant John Kalb, CHSI's chief  
25 underwriting officer, was responsible for accepting and rejecting applications for workers  
26 compensation coverage on behalf of CRMBC and setting rates for members in accordance with  
27 guidelines established by CHSI and CRMBC. (Dkt. No. 1, Ex. 3, "CRMBC Complaint.") Mr.  
28 Kalb performed these duties on behalf of CHSI, who was appointed as CRMBC's Administrator.

1 Pursuant to the terms of the Management Services Agreement, CRMBC authorized CHSI to  
2 “manage the daily operations of the mutual benefit group and to accept and underwrite applications  
3 from applicants to the Program,” in addition to act as the manager of CRMBC’s business with  
4 various authority regarding the compensation policy coverage. (Id.)

5 CRMBC alleges that CHSI breached the terms of the Management Services Agreement by  
6 failing to properly underwrite CRMBC accounts and applications for workers compensation  
7 coverage, resulting in a substantial deficit of over \$4 million.(Id.) As a result of this alleged  
8 mismanagement, the California Office of Self-Insurance Plans performed a special audit of  
9 CRMBC that revealed deficiencies in the CRMBC group fund from 2005-2011.(Id.) Based on  
10 these allegations, CRMBC asserts four counts against CSHI for breach of written contract,  
11 negligent supervision and training, negligent misrepresentation, and breach of fiduciary duty.

### 12 13 **Navigators’ Complaint**

14 As a result of the underlying CRMBC action, Plaintiff/Insurer Navigators has brought this  
15 action seeking declaratory judgment that it is under no duty to indemnify Defendant/Insured  
16 CSHSI in the CRMBC action. In it’s first claim, Navigators asserts that CHSI is not entitled to  
17 coverage under the Policy because CHSI failed to establish the condition precedent necessary to  
18 trigger coverage. Navigators asserts that the insurance Policy established, as a condition precedent,  
19 that no Insured had a basis to believe prior to the inception date of the first policy issued on July  
20 12, 2009, that “any such act or omission, or related act or omission, might reasonably be expected  
21 to be the basis of a claim.” (Dkt. No. 1 at 10.) Navigators asserts that CHSI and Mr. Kalb were  
22 “aware of acts or omissions that might reasonably be expected to be the basis of a claim.  
23 Specifically, beginning at least as early as January 2009, Kalb and/or CHSI knew that they were  
24 charging rates for worker’s compensation insurance on behalf of CRMBC that were lower than the  
25 rates that the CRMBC Board of Trustees had approved.” (Id.) In short, Navigators claims that  
26 CHSI knew that their acts on behalf of CRMBC would result in the basis of a claim. Since CHSI  
27 knew of these actions prior to the inception date of the policy issued by Navigators on July 29,  
28 2012, then the entire CRMBC Action claim is exempt from coverage.

1 Navigators further alleges that the policy agreement does not cover claims that arise out of  
 2 professional services performed if the Insured was “an owner, partner, member, director, officer or  
 3 employee” of the entity for which it performed services. (Dkt. 1, Ex. A, “Policy Agreement.”)  
 4 Navigators asserts that CHSI and its Chief Executive Officer Jim Leftwich, “operated and managed  
 5 CRMBC and/or was a director, officer or employee of CRMBC.” Thus, the professional services  
 6 are not covered under the Policy agreement. Lastly, in the event that the Court determines that  
 7 Navigators has a duty to defend or indemnify, Navigators seeks to limit liability. First, Navigators  
 8 seeks to limit liability to \$2 million in connection with the CRMBC Action. In the alternative,  
 9 Navigators seeks to limit the policy coverage in whole or in part based other grounds detailed in  
 10 the policy coverage that prohibit the types of damages that CRMBC seeks in its action.

#### 11 12 **Insurance Policy**

13 The insurance policy issued by Navigators to CHSI on July 12, 2009 is an errors and  
 14 omissions insurance policy with a limit of liability of \$2 million for each claim. The policy  
 15 obligates Navigators to pay sums in excess of the \$25,000 deductible that CHSI becomes legally  
 16 obligated to pay:

17 as damages and claim expenses as a result of a claim first made against the  
 18 Insured and reported in writing to the Company during the policy period or  
 19 Extended Reporting Period, by reason of an act or omission including personal  
 20 injury in the performance of professional services by the Insured or by  
 21 someone for whom the Insured is legally responsible, provided that: 1) Such  
 act or omission was committed on or subsequent to the retroactive date...; and  
 2) Prior to the inception date of this policy and if continuously renewed, no  
 Insured had a basis to believe that any such act or omission, or related act or  
 omission, might reasonably be expected to the basis of a claim.

22 The policy does not provide coverage for claims:

23 [b]ased on or arising out of professional services performed for or by any  
 24 business enterprise not named in Item 1. In the Declarations if on or after the  
 25 date or time of the act or omission giving rise to such claim: 1) Any Insured  
 26 controlled, owned, operated or managed such entity; or 2) Any Insured was  
 27 an owner, partner, member, director, officer or employee of such entity.  
 Control of or ownership in a business enterprise is presumed if any Insured  
 owned or held 25% or more of the equity and/or debt instruments of such  
 enterprise.

28 Professional services is defined as “financial risk management, business consulting,

1 and notary services. Furthermore the policy does not apply to any claim:

2 based upon or arising out of any dishonest, intentionally wrongful,  
 3 fraudulent, criminal or malicious act or omission by an Insured. The  
 4 Company will provide the Insured with a defense of such claim unless and  
 5 until such dishonest, intentionally wrongful, fraudulent, criminal or  
 6 malicious act or omission has been determined by any final adjudication,  
 finding of fact or admission by the Insured...and the Company will have  
 the right to seek recovery of the defense costs incurred from the Insured  
 found to have committed the acts or omissions.

7 (Dkt. No. 1, Ex. A)

## 9 II. STANDARD OF REVIEW

10 The federal Declaratory Judgment Act provides, “In a case of actual controversy within its  
 11 jurisdiction...any court of the United States, upon the filing of an appropriate pleading, *may* declare  
 12 the rights and other legal relations of any interested party seeking such declarations, whether or not  
 13 further relief is or could be sought.” 28 U.S.C. §§ 2201(a) (emphases added). Accordingly, once  
 14 jurisdiction is established, it is always discretionary with the Court whether to entertain an action  
 15 for a declaratory judgment. Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112, 82 S.  
 16 Ct. 580, 582, 7 L. Ed. 2d 604 (1962); Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494,  
 17 62 S. Ct. 1173, 1175, 86 L. Ed. 1620 (1942). “In the declaratory judgment context, the normal  
 18 principle that federal courts should adjudicate claims within their jurisdiction yields to  
 19 considerations of practicality and wise judicial administration.” Wilton v. Seven Falls Co., 515  
 20 U.S. 277, 288, 115 S. Ct. 2137, 2143, 132 L. Ed. 2d 214 (1995). The Court may refuse to give  
 21 such relief if the declaratory relief would not settle the controversy between the parties. Aetna Cas.  
 22 & Sur. Co. v. Quarles, 92 F.2d 321 (C.C.A. 4th Cir. 1937); Williams v. Ball, 294 F.2d 94 (2d Cir.  
 23 1961), cert. denied, 368 U.S. 990, 82 S. Ct. 598, 7 L. Ed. 2d 526 (1962).

24 The Ninth Circuit has elaborated on the *Brillhart* factors articulated by the Supreme Court  
 25 as to when declaratory relief is appropriate. “In deciding whether to entertain action under  
 26 Declaratory Judgment Act, district courts should avoid needless determination of state law issues,  
 27 discourage litigants from filing declaratory actions as means of forum shopping, and avoid  
 28 duplicative litigation.” Gov't Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225 (9th Cir. 1998).

1 The pendency of a state court action alone does not require a district court to refuse federal  
 2 declaratory relief. Rather, “if there are parallel state proceedings involving the same issues and  
 3 parties pending at the time the federal declaratory action is filed, there is a presumption that the  
 4 entire suit should be heard in state court.” Id. citing Chamberlain v. Allstate Ins. Co., 931 F.2d  
 5 1361, 1366–67 (9th Cir.1991). The Supreme Court has counseled district courts to “ascertain  
 6 whether the questions in controversy between the parties to the federal suit, and which are not  
 7 foreclosed under the applicable substantive law, can better be settled in the proceeding pending in  
 8 the state court. This may entail inquiry into the scope of the pending state court proceeding and the  
 9 nature of defense open there.” Brillhart, 316 U.S. 112. In addition, the Ninth Circuit has  
 10 acknowledged several additional factors relevant to the analysis:

11           The Brillhart factors are not exhaustive. We have suggested  
 12 other considerations, such as ‘whether the declaratory action  
 13 will settle all aspects of the controversy; whether the  
 14 declaratory action will serve a useful purpose in clarifying the  
 15 legal relations at issue; whether the declaratory action is being  
 16 sought merely for the purposes of procedural fencing or to  
 obtain a ‘res judicata’ advantage; or whether the use of a  
 declaratory action will result in entanglement between the  
 federal and state court systems. In addition, the district court  
 might also consider the convenience of the parties, and the  
 availability and relative convenience of other remedies.

17 Dizol, 133 F.3d at 1225 n.5.

18           In the insurance context, when an insurer brings a declaratory relief action in the district  
 19 court to determine its obligation to defend or indemnify its insured, while a state court action to  
 20 resolve the same issue of coverage between the same parties is pending, a stay or dismissal of the  
 21 declaratory relief action is proper. Wilton, 515 US. At 283; Aetna Casualty & Surety Co. V.  
 22 Merritt, 974 F.2d 1196, 1199 (9<sup>th</sup> Cir. 1992). The fact that the issues are not identical or one party  
 23 in the federal action is not a party in the state action does not, however, preclude the court from  
 24 issuing a stay. Polido v. State Farm Mutual Auto Ins. Co., 110 F.3d 1418, 1423 (9<sup>th</sup> Cir., 1997)  
 25 (overruled on other grounds in Dizol, 133 F.2d 1220). “However, there is no presumption in favor  
 26 of abstention in declaratory actions generally, nor in insurance coverage cases specifically.” Dizol  
 27 133 F.3d at 1225.  
 28



### 1 III. DISCUSSION

2 It is undisputed that this Court has diversity jurisdiction pursuant to 28 U.S.C. §1332.  
 3 Navigators' claim is a dispute between an insurer and an insured over the duties to defend an  
 4 indemnify. This type of dispute has been held to satisfy the "case and controversy" requirement for  
 5 purposes of the Declaratory Judgment Act, whether or not there is an underlying state court action  
 6 pending. American States Ins. Co. v. Kearns, 15 F.3d 142, 143 (9<sup>th</sup> Cir. 1994); Aetna 974 F.2d at  
 7 1199. Accordingly, the Court considers whether it should exercise its discretion to decline  
 8 jurisdiction over this matter, or stay it pending resolution of the underlying state court litigation.

9 Defendants contend that the coverage action will be duplicative of the underlying CRMBC  
 10 action, as there is substantial overlap of the factual and legal issues that must be adjudicated in  
 11 CRMBC action prior to resolution of the present coverage claim. In short, Defendants contend that  
 12 the CRMBC Action is a "parallel action with the same issues and same parties," and therefore fails  
 13 to satisfy the first factor of the *Brillhart* test. Navigators accurately notes that it is not a party to the  
 14 CRMBC action, nor is insurance coverage an issue in the underlying case. However, an exact or  
 15 precise identity of issues between the federal and state action is not required to support dismissal of  
 16 a declaratory action. Allstate Ins. Co. v. Mercier, 913 F.2d 273, 278-79 (6<sup>th</sup> Cir. 1993).

17 The question for the Court is whether Navigators' coverage obligations can be determined  
 18 independently of the adjudication of the CRMBC Action. If, however, Navigators' coverage turns  
 19 on factual issues that are in dispute in state court, a dismissal or stay of the request is appropriate.  
 20 Am. States Ins. Co. V. Canyon Creek, 786 F.Supp. 821, 824-25 (N.D.Cal.1991) ("To decide  
 21 whether coverage exists under the applicable policies, the Court merely must determine whether  
 22 the allegations in the complaints in the state court actions, *even if accepted as true*, give rise to  
 23 coverage under the policies at issue. In ruling one way or another on this issue, the Court is in no  
 24 way reaching the merits of the underlying complaints.")

25 The Court turns to Navigators' first claim, which contends that the policy excludes  
 26 coverage for claims that existed prior to the inception of the policy agreement on July 9, 2012 (the  
 27 "Prior Knowledge Condition"). Navigators asserts that CHSI and/or John Kalb are not entitled to  
 28 coverage under the policy because the basis of the CRMBC action arises out of a claim which



1 CHSI had “knowledge beginning at least as early as January 2009 [that] Kalb and/or CHSI knew  
 2 [sic] they were charging rates for worker’s compensation insurance on behalf of CRMBC that were  
 3 lower than the rates that the CRMBC Board of Trustees had approved.” CHSI’s knowledge that  
 4 their actions would be the basis of a claim, although previously undisclosed, existed prior to the  
 5 inception of the policy agreement. Navigators contends that the CRMBC claim is therefore  
 6 excluded under the “Prior Knowledge Condition,” and Navigators has no duty to defend CHSI in  
 7 the underlying state court action. Defendants counter that the factual issue of whether CHSI and/or  
 8 John Kalb knew that they were undercharging worker’s compensation claims is at the heart of the  
 9 CRMBC action. Indeed, the underlying CRMBC complaint alleges that CHSI “failed to perform  
 10 its obligations under the contract in that it failed to perform underwriting duties adequately and  
 11 charge sufficient rates.” (CRMBC Complaint at 13.)

12 To assess Navigators’ first claim, this Court would need to make two factual  
 13 determinations. First, the Court would need to determine what CHSI and/or Kalb knew prior to the  
 14 inception date at issue, and, second, whether such knowledge would have been basis to believe that  
 15 a claim might be made. CRMBC asserts in it’s opening brief that the Court must look at the  
 16 subjective intent of CHSI and/or Mr. Kalb to determine the ultimate coverage question. In reply,  
 17 Navigators pleads that the Court utilize a reasonable person standard, which would preclude any  
 18 subjective test that would need to take place in the underlying action. *See Weddington v. United*  
 19 *Nat’l Ins. Co.*, 346 F. App’ x 224, 2126 (9<sup>th</sup> Cir. 2009) (ruling on a coverage defense as a matter of  
 20 law where “the use of the phrase ‘or could have reasonably foreseen’ indicates that coverage is  
 21 excluded where a claim was foreseeable from a reasonable, objective viewpoint.”). At this time,  
 22 the Court will refrain from asserting whether a subjective or objective test is required to determine  
 23 the claim. *See Indian Harbor Ins. Co. v. Meridian Comm., Inc.*, No. C 06-655, 2007 WL 951282  
 24 (N.D. Cal. Mar. 27, 2007.) (“the question of whether an objective or subjective test applies to this  
 25 kind of prior knowledge provision has not been clearly settled by California courts.”) Regardless  
 26 of the type of test used to determine the claim, it remains that there are certain factual issues that  
 27 overlap in both cases. To assess CRMBC’s breach of contract claim, the state court will need to  
 28 determine if CHSI and/or John Kalb failed to adequately perform their underwriting services

1 according to the terms of the contract. This requires a determination of the existence of an  
2 agreement, any violations between the parties of the agreement, and damages. To determine  
3 whether CHSI violated the terms of the contract, the state court will need to inquire as to what the  
4 parties knew regarding the performance of services during the contractual period. In the present  
5 coverage claim, this Court will also need to determine whether CHSI and Mr. Kalb performed  
6 professional services for CRMBC, and what CHSI and Mr. Kalb knew about the performance of  
7 those services that could have lead to the basis of a claim. Accordingly, there is factual overlap  
8 between these two cases as to the knowledge that CHSI and Mr. Kalb had regarding the  
9 performance of their underwriting services to CRMBC.

10 The Court turns to Navigators' second claim to further assess whether there is significant  
11 overlap between the two cases to warrant dismissal or stay. As detailed by the insurance policy  
12 above, Navigators asserts that policy coverage does not extend to claims that are based upon or  
13 arise out of services performed for a business enterprise if any insured "operated or managed" the  
14 business enterprise, or any insured was a "director, officer or employee" of such enterprise (the  
15 "Business Enterprise Exclusion"). In its' complaint, Navigators' cites CRMBC's website, which  
16 states that Jim Leftwich is "the founder and CEO of CHSI, the program administrator for the  
17 CRMBC...[and] Jim was asked to serve on the [CRMBC] Board of Trustees by other members  
18 because of his broad experience and expertise." (Dkt. No. 1 at 5.) The question of whether CHSI's  
19 claim is precluded under the policy based on the Business Enterprise Exclusion has no factual  
20 connection to any of the claims in the underlying CRMBC Action. Nowhere in CRMBC's  
21 complaint or in any of the briefings do the Defendants' assert that the CRMBC Action requires a  
22 finding of fact that Jim Leftwich either "operated or managed" CRMBC or that he was a CRMBC  
23 "director, officer or employee." The Court therefore finds no overlap between the two cases  
24 regarding Navigators' second claim.

25 Navigators third and fourth claims are broadly based on an interpretation of the policy  
26 agreement. The third claim seeks to limit coverage based on the policy that "any claim based in  
27 whole or in part on any act or omission...in the performance of professional services committed  
28 prior to December 13, 2010, then each claim limit of liability is \$2 million." (Dkt. No. 1 at 12.)

1 The factual issue to be determined here is whether or not CHSI actions were performed prior to  
2 December 13, 2010. The CRMBC complaint alleges that CRMBC and CHSI entered into their  
3 contractual agreement on or around September 2004, and that CHSI set rates and issued  
4 distributions between 2005 and 2011. (CRMBC Complaint at 12.) CRMBC's Complaint, if taken  
5 to be true, therefore sufficiently states the facts needed to determine the limited liability issue in  
6 question, and the Court could make this determination without any inquiry into the adjudication of  
7 the CRMBC Action. Navigators' fourth claim seeks to further limit coverage for the CRMBC  
8 Action based in whole or in part by other "potentially applicable provisions of the policy." Again,  
9 this claim largely turns on the interpretation of the policy language.

10 Having reviewed Navigators' four claims, the Court finds but one area of necessary factual  
11 overlap with the underlying CRMBC action. The similarity, however, is in Navigator's first and  
12 primary coverage claim, which largely turns on the facts in the underlying state court action.  
13 Defendants contend that even if there are only a few similarities, that the cases are "parallel  
14 because they both arise out of the same factual transaction." (Dkt. 9 at 15.) Defendants rely on the  
15 Ninth Circuit decision in Employers Reinsurance Corporation v. Karussos, 65 F.3d 796, 800 (9<sup>th</sup>  
16 Cir. 1995) (overruled on other grounds by Dizol, 133 F.3d at 1227). In this case, the Ninth Circuit  
17 held the district court abused its discretion in asserting jurisdiction over a declaratory judgment  
18 action that involved only state law questions of insurance coverage and was brought during  
19 pendency of related state court proceedings. Id. The Court relied on the *Hungerford* rule that  
20 courts should "decline to assert jurisdiction in insurance coverage and other declaratory relief  
21 actions presenting only issues of state law during the pendency of parallel proceedings in state  
22 court' unless there are 'circumstances present to warrant an exception to that rule.'" Id. at 798,  
23 quoting American National Fire Insurance Co. V. Hungerford, 53 F.3d 1012, 1019 (9<sup>th</sup> Cir. 1995).

24 In Karussos, the Ninth Circuit found that courts should invoke the *Hungerford* rule even  
25 when there are only some similar issues among the two actions. Similar to this case, in Karussos,  
26 the Insurer brought a complaint seeking declaratory judgment in federal district court under the  
27 premise that the Insurer had a duty to defend the Insured. Karussos, 65 F.3d at 800. The issue of  
28 the duty to defend turned on factual questions that overlapped with those at issue in the underlying

1 state court litigation. Id. In remanding the case, the Ninth Circuit reminded courts that concerns of  
2 “‘practicality’ and ‘wise judicial administration’ generally counsel against the exercise of federal-  
3 court jurisdiction over claims for declaratory relief that involve only state law questions and are  
4 brought during the pendency of a related state court proceeding.” Id. at 801, referencing  
5 Hungerford, 53 F.3d 1012 and Continental Cas. Co. V. Robsac Indus., 947 F.2d 1367, 1374 (9<sup>th</sup>  
6 Cir. 1991). Here, there are only questions of state law before the Court, and it remains undisputed  
7 that the case relates to the underlying state court action. Accordingly, the Court finds it sufficient  
8 to find that the underlying state court action, while not precisely the same, is sufficiently related to  
9 the present case to weigh in favor of withholding jurisdiction at this time.

10 The Court next considers the second *Brillhart* factor which seeks to discourage parties from  
11 using federal declaratory judgment actions as a means of forum shopping. Dizol, 133 F.3d at 1225.  
12 Bringing a separate insurance claim in district court alone does not constitute improper forum  
13 shopping. The only evidence suggesting forum shopping is that Navigators filed the district court  
14 action following the CRMBC state court action, possibly as a reactionary measure. As articulated  
15 by the Ninth Circuit in Robsac, improper forum shopping relates to “the defensive or reactive  
16 nature of a federal declaratory judgment suit, and...if a declaratory judgment suit is defensive or  
17 reactive, that would justify a court’s decision not to exercise jurisdiction.” Robsac, 947 F.2d at  
18 1371-1372 (internal citation omitted). Here, there are certain signals that indicate Navigators filed  
19 the present lawsuit as a tactical advantage. First, Navigators filed the present litigation only four  
20 months after CRMBC filed the underlying state court action. Defendant CRMBC accurately points  
21 out that Navigators seeks an improper procedural advantage by litigating the coverage defenses “on  
22 the basis of a barren record.” At the time of the filing of the motions to dismiss, the CRMBC state  
23 court lawsuit had been stayed pending arbitration between the parties, and the discovery period was  
24 in the nascent phases. (Dkt. No. 3, Ex. A.) Second, Navigators does not have an ability to  
25 intervene in the underlying state court action; however, it does have state court remedies following  
26 the resolution of the lawsuit. Navigators fails to directly respond to these concerns. Nor does  
27 Navigators entertain the proposition that it has available state court remedies to resolve its  
28 coverage action in the future on the basis of a more fully developed record. Accordingly, and due

1 to caution articulated by the Supreme Court regarding forum shopping, the Court finds that  
2 Navigators seeks an improper advantage by seeking declaratory relief in this Court.

3 The Court further considers whether Navigators' action would constitute duplicative  
4 litigation, and additionally whether the resolution would fully resolve the legal questions at issue  
5 between the parties. Similar to the question as to overlap of factual and legal issues detailed above,  
6 the Court finds that there would necessarily be duplicative questions of fact that would need to be  
7 determined in the present litigation. In particular, Navigators' first claim requires determining  
8 whether CHSI and/or Mr. Kalb knew that their actions could be the basis of a claim. Resolving  
9 these questions to determine the issue of insurance coverage, however, will not fully resolve the  
10 legal questions at issue between the parties. Even assuming *arguendo* that the Court were to  
11 dismiss Navigators' first claim due to overlap, and render judgment on the last three claims - the  
12 factual and legal issues between the remaining parties would still exist in the underlying state court  
13 action. Furthermore, if the Court were to proceed with all of Navigators' claims, the Insured,  
14 CHSI, could be required to take inconsistent positions in the two actions in terms of what  
15 knowledge it had and when it had the knowledge regarding alleged mismanagement of CRMBC's  
16 account. Courts have held that regardless of factual overlap, prejudice to the insured occurs when  
17 it is forced to fight a "two front war." Great Am. Ins. Co. v. Sup. Ct., 178 Cal. App. 4<sup>th</sup> 221, 271  
18 (2009). As such, the declaratory relief action will not resolve all of the coverage issues among the  
19 parties, and further could result in unfair prejudice against the insured, CHSI. It therefore remains  
20 within the Court's discretion not to take up this action. Dizol, 133 F.3d at 1225.

#### 21 22 **IV. CONCLUSION**

23 The Court finds that Navigators' action has sufficient factual overlap with the underlying  
24 state court action, Navigators' attempt to bring this action before the Court constitutes a reactive  
25 filing, and the adjudication of Navigators' case could result in duplicative judgments that would  
26 violate the principles of judicial efficiency and potentially result in unfair prejudice against the  
27 insured. Although these factors may warrant dismissal, if the pending state court action is settled  
28 between the parties, then the risks articulated above would be greatly minimized if not fully


1 eliminated. A stay of declaratory relief action pending resolution of the third party suit is therefore  
2 appropriate. *See Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287 (Cal. 1993).

3 The Court exercises its' authority to **STAY** Navigators' claim. Accordingly, the Court  
4 hereby **GRANTS** Defendant CRMBC's motion to stay, **DENIES** Defendant CHSI's motion to  
5 dismiss, and **DISMISSES** Plaintiff's motion to strike Defendant CHSI's motion to join as **MOOT**.  
6 (Dkt. Nos. 3, 9, 25)

7 Having so held, the Court hereby **VACATES** the hearing date scheduled for May 10, 2013  
8 on Plaintiff's motion for summary judgment. The Court further **ORDERS** Defendants CRMBC  
9 and CHSI to file a status report with this Court every four months regarding the state court action.  
10 The first status report is therefore due to the Court on or before June 3, 2013.

11 **IT IS SO ORDERED.**

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13 DATED: February 4, 2013

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15 HON. GONZALO P. CUriEL  
16 United States District Judge  
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